THE COMMERCE CLAUSE AND INTRASTATE RATES.

"Commerce among the states cannot stop at the external boundary line of each state, but may be introduced into the interior.

"It is not intended to say, that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states. Such a power would be inconvenient, and is certainly unnecessary.

"Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more states than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a state, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power was to be extended, would not have been made, had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a state. The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a state, then, may be considered as reserved for the state itself."[1]

In 1824 Chief Justice Marshall in that illustrious pioneer decision, *Gibbons* v. *Ogden*, thus explained the nature of intrastate commerce. In April of the past year Judge Sanborn of the United States Circuit Court for the District of Minnesota decided that since it is wholly impossible for carriers, situated as are the Great Northern, Northern Pacific and Minneapolis & St. Paul companies, to maintain materially lower rates for traffic wholly within Minnesota than for traffic between Minnesota and any of its neighboring states without causing a reduction of their interstate rates and a serious impairment of the volume of their interstate business, therefore legislative acts and orders of the State Railroad and Warehouse Commission requiring such lower rates are unconstitutional and void as a substantial burden upon interstate commerce.[2]

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[1]Gibbons *v.* Ogden (1824) 9 Wheat. 1, 194.

[2]Shepard *v.* Northern Pac. Ry. Co. et al., and other cases (1911) 184 Fed. 765.

For example, there are various twin cities such as Superior, Wisconsin, and Duluth, Minnesota; Grand Forks, North Dakota, and East Grand Forks, Minnesota; Fargo, North Dakota, and Moorhead, Minnesota; and Wahpeton, North Dakota, and Breckinridge, Minnesota, which on account of their situations had always been accorded by the railroad companies serving them like rates in and out. The State Commission reduced the class rates on general merchandise 20% to 25%. Corresponding reductions were made in commodity and passenger rates. Simultaneously with this compulsory reduction of intrastate rates, the railroads, in order to prevent discrimination against localities and the consequent loss of business, reduced to a parity their interstate rates to the corresponding twin city in each group lying outside the state.

Previously, in January of the same year, the United States Circuit Court for the Eastern District of Kentucky refused to adopt such a doctrine and held upon a substantially similar statement of facts that the burden on interstate commerce was not so direct as to amount to a forbidden interference.[3] To state more specifically the situation and the argument made in this case against the legislation in question, it was contended that since a reduction of local rates between points on the south side of the Ohio River (such as Louisville, Covington and Newport) and Bardstown would necessitate a corresponding reduction of the interstate rates from Jeffersonville and Cincinnati (which had always taken the same rates as Louisville, Covington and Newport) to Bardstown, not to speak of the rates from points north of Cincinnati and Jeffersonville, an order of the Kentucky Railroad Commission compelling such reduction was consequently void as a direct interference with interstate commerce. Judge Sanborn did not refer to this case.

Again in May, 1911, Judge Trieber in the Circuit Court for the Eastern District of Arkansas, rendered a decision in what are known as the *Arkansas Rate Cases*,[4] in which he followed the Kentucky decision, and in effect repudiated the doctrine of Judge Sanborn, although remarking that the facts before him were quite different, "and for this reason the court is of the opinion that the conclusions reached in the Shepard case are not applicable to these cases."[5]

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[3] Louisville & Nashville R. R. Co. *v.* Siler, et al. (1911) 186 Fed. 176.

[4] In re Arkansas Rate Cases (1911) 187 Fed. 290.

[5] *Ibid.* 303.

The Minnesota, Kentucky and Arkansas cases are now before the Supreme Court, together with numerous other rate cases, previously adjudicated in the federal and state courts, involving substantially similar facts.[6]

[6]These other cases are: Chesapeake & Ohio Ry. Co. *v.* Conley et al., Coal and Coke Ry. Co. *v.* Conley et al. (1910) 67 W. Va. 129; St. Louis & St. F. R. Co. *v.* Hadley et al., and 17 other cases (1909) 168 Fed. 317; 161 Fed. 419; 155 Fed. 220; Oregon Railroad & Navigation Co. *v.* Campbell, et al. (1909) 173 Fed. 957; and Southern Pacific Co. *v.* Campbell, et al. (1911) 189 Fed. 182; see also, Woodside *v.* Tonopah and G. R. R. Co. et al. (1911) 184 Fed. 358; Washington Southern Ry. Co. *v.* Comw. (Va.) 71 S. E. 539.

In the Missouri case above cited, 168 Fed. 317, 344, the court said: "Because railway systems reach into many states, and are units, crossing state lines arbitrarily fixed, a hopeless condition is not thereby brought about. It is not true, as some say, that each state can lower the rates to confiscation, as all know who have read the decisions to any purpose. I believe, as firmly as does any one in the power and the rights of our general government, and, when the clashings come as to the power of the state and the general government, let the doubts be solved in favor of the government. But as to some matters there are no doubts, and two of those are that the Constitution is the supreme law of the land, and that as to all local matters the states are in control. All should insist upon both."

In one of the Oregon cases referred to, namely, 173 Fed. 957, 983-5, the court said: "The Baker City situation is relied upon as a demonstration that the local or state rates, if approved, will unsettle interstate regulation, or rather will disturb the situation as it now stands. That city is engaged in a jobbing business, and is importing merchandise from points east of the Missouri river and in California, which it sells to customers within a certain radius of territory in job lots. Under tariff U. P. I. C. C. No. 1,578 and No. L—525, the Baker City jobbers pay a freight rate from point of origin in the East or in California generally equal to the car load rate to Portland plus car load rate from Portland to Baker City, and are required to pay the less than car load rate from Baker City to points of distribution. Now, the Portland jobber is required to pay the car load rate from point of origin in the East and in California to Portland and the less than car load rate from Portland to point of distribution. So it is, says the complainant, that the profit of the Baker City jobber and his ability to sell merchandise depend upon the differences between the car load rate out of Portland and the less than car load rate from Portland to the point of distribution. It is further claimed that the rates established by the Commission's order in comparison with those fixed by L—525 greatly decrease the difference between the car load rates and the less than car load rates to Portland, 'so that interstate traffic originating in the East and in California, and so in the past distributed from Portland and from Baker City, respectively, can only be distributed advantageously and with profit from Portland to all points in eastern Oregon,' and, therefore, that the commission's order attempts to regulate the movement of, as well as the rate charged upon, interstate commerce.

"This is only an illustration of how rate making may destroy and build up jobbing centers, considering the facts stated to be true, and the deduction legitimate. But transportation companies do not have, nor can they longer claim, a monopoly upon rate making. Suppose, however, Portland was able to supply from home production all the different kinds of merchandise that the Baker City jobber wanted in his trade. A reasonable freight rate made by the state for the transportation of the merchandise to Baker City and interior points would be perfectly legitimate. If that rate enabled Portland, through its home-produced merchandise, to displace the business of the jobber in Baker City, dealing in like merchandise from other states, how could it be said that the state freight

Is the interpretation given to the commerce clause of the Federal Constitution by Chief Justice Marshall in 1824 no longer adequate in the light of modern conditions? Is the far-reaching doctrine as laid down by Judge Sanborn in the *Minnesota Rate Cases* sound? Is it likely to be followed by the Supreme Court or is the decision in the Kentucky case, which in effect repudiates

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tariff was unconstitutional, and therefore unlawful? The state rate does not apply to interstate commerce; nor was it designed so to apply. But if the Portland merchant imports his goods, and then jobs them from Portland, the result will be the same as if he were dealing in home products, because the importations will have become domesticated. If that method of dealing constitutes or induces a change in the movement of interstate commerce, it is the thing that the merchant will or will not do as his profits in business may impel him. The movement of his merchandise when it goes out of Portland to the interior of the state is intrastate. I am not speaking now of goods imported to Portland in original packages, and then shipped out to points in the interior of the state in like packages as shipped to Portland, because I am not now called upon to determine whether such character of movement would constitute interstate traffic. It will be time enough to decide such a case when it arises. I have reference to such merchandise as may be first imported to Portland, and then, going into a wholesale dealer's common stock, is wholesaled or jobbed out to customers in the interior of the state—such a movement of merchandise from Portland to the interior of the state as would constitute intrastate shipment pure and simple. If this kind of traffic, with the freight rate imposed upon it by the state, is of such proportions and such percentage as to affect trade in interstate merchandise, and therefore render it advantageous to interstate lines to change their rates, so as to control the trade in certain channels, that is not a trenching upon the exclusive authority of Congress to regulate interstate commerce. The interference is but incidental, and flows from a perfectly legitimate regulation of freight rates by the state, and an altogether natural movement of trade; and the condition is absolutely beyond the control of Congress.

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"* * * Let it be supposed that the state was the precursor in making rates for the transportation of purely intrastate commerce, there could, then, at that juncture, be no conflict. Could it be contended that the state rate was invalid, because connecting railroads might desire to establish a transcontinental rate in combination with a local rate, also of their own making, which would conflict with the state rate? If so, the fixing of a state rate would be a precarious and evanescent thing, to be dissipated at the caprice of the transportation companies, and the general government would usurp, in practical effect, the functions of the state government in the regulation of intrastate commerce. Such was not the purpose of the framers of the Federal Constitution. Nor was it the purpose of Congress itself in the adoption of the interstate commerce act, wherein was recognized, as had been noted before, the right of the state to regulate commerce wholly within its borders. The bill, therefore, in my opinion, states nothing that renders either the state railroad commission act or the order of the commission in conflict with the commerce clause of the Federal Constitution. This conclusion is borne out by the decisions of the Supreme Court."

In the Woodside case above referred to, 184 Fed. 358, 360, Circuit Judge Morrow said: "* * * A rate fixed by a state railroad commission for intrastate traffic, if just and reasonable in and of itself, cannot be held to be unlawful and discriminatory because it may conflict with some rate fixed by a railroad company for interstate traffic. Upon adjustment the latter rate must yield."

the doctrine of Judge Sanborn and holds strictly to the original interpretation of Chief Justice Marshall, the one which alone can stand the test of constitutional interpretation by our highest court? The purpose of this article is to attempt to answer these questions in so far as is possible from an analysis of the principal decisions by the Supreme Court bearing upon them. The numerous other questions involved in these cases, notably the questions of due process of law and the equal protection of the laws guaranteed by the Fourteenth Amendment, form no part of this discussion, although the Supreme Court may conceivably, *ab inconvenienti*, rest its decision, in some of the cases, at least, upon these grounds.

The importance of arriving at a definite conclusion as to these questions cannot be overestimated. To-day the economic reasons for giving to the federal government complete power over our great transportation systems are strikingly potent, perhaps to an even greater extent than four years ago, when a condition of affairs bordering upon a most serious conflict between state and federal authority was terminated by the Supreme Court's decision in *Ex Parte Young*,[7] of which the present Minnesota cases are a direct continuation. This decision, declaring unconstitutional the penal and criminal provisions of the Minnesota statutes, left unsettled the rate provisions of those statutes, so far as the question of interference with interstate commerce was concerned, but Justice Peckham took occasion to remark that "the question is not, at any rate, frivolous."[8]

As one writer has said:

"* * * The country is familiar with the difficulties in adjusting the action of Federal and State commerce commissions. They involve the problem of harmonizing the major Federal interest and the very minor State interest in the traffic of the great lines of railroad. As the States cannot participate in the legal control of the interstate business of these lines, the situation seems to present a phase analogous to that suggested by Madison's proposition in the Constitutional Convention—'that the general government be invested with powers of incorporation where States are incompetent.' Practical changes in commerce have led directly to this modification of the related governmental powers. At the time of the adoption of the Constitution, the 'commerce among the several States' merely touched the circumference of the States—by the landing of vessels at coastwise or riparian points. The penetration and commingling of external and internal commerce is a product of the railroad. These new physical conditions have produced the anomaly of a double action of legal

[7] (1908) 209 U. S. 123.
[8] *Ibid.* 145.

powers upon business which is essentially a unit. Our transportation system is very much in the position which our political system would have occupied had Calhoun's proposition prevailed, for a constitutional amendment dividing the executive power of the nation, providing for two Presidents. Some measure is needed to relieve the business of transportation from the confusing and injurious dominance of two or more economic executives."[9]

But this purports to be purely a legal, not an economic treatise. It is easy enough to say that the Interstate Commerce Act should be amended so as to include intrastate as well as interstate commerce. The question sought to be answered here is not, should the Interstate Commerce Act be so amended, but rather, may it be so amended, without first amending the Constitution? Admitting that it would be better to have unity in rate regulation, the expediency of such unity does not determine its constitutionality. The legal question still remains,—the question of the existence or non-existence of the power. We know that such power is not expressed in the words of the commerce clause. Is it to be implied from these words? What to-day, is the correct interpretation of the phrase, "affect other states," or "affect the states generally," as used in *Gibbons* v. *Ogden*? Has the Supreme Court ever announced that the commerce clause comprehends intrastate commerce? It may be objected that this question is too broadly stated, that it unreasonably extends the doctrine of the Minnesota cases. It is submitted that this is not true, because the inevitable result of Judge Sanborn's reasoning would be to strip the States of all regulating power over intrastate rates.

At this very point, before entering upon an analysis of rate cases, we are naturally led, at least those of us who believe in the advisability of a continuing increase in federal authority, to cite cases where the police power of the States is brought into conflict with the complete expression of federal authority under the various clauses of the Constitution, and more particularly under the Commerce Clause, expression which is necessarily implied by the very words of the Constitution, not usurped, and without which adequate federal regulation would in many instances be rendered impossible. The very latest decision by the Supreme Court on this subject, *Southern Railway* v. *United States*,[10] holds

[9] "Considerations for a 16th Amendment." Edw. L. Andrews (1907) 69 Albany L. Jour. 363, 364.

[10] (1912) 32 S. C. Rep. 2. See also Mondou *v.* N. Y., N. H. & H. R. R. Co. and three other cases, (1912) 32 S. C. Rep. 169, (upholding the constitutionality of the Federal Employers' Liability Act of 1908) in which all of the more important decisions are collected.

that Congress can require and regulate the use of safety appliances on all equipment used on any railroad engaged in interstate commerce, even though the equipment may be used solely for intrastate traffic. The court so decided because, as it said, there is such a close and direct relation or connection between the two classes of traffic when moving over the same railroad as to make it certain that the safety of the interstate traffic, and of those who are employed in its movement, will be promoted in a real and substantial sense by applying the requirements of the safety appliance acts to vehicles used in moving the traffic which is intrastate, as well as to those used in moving that which is interstate.[11]

This decision is eminently sound, and it is difficult to see how the court could have decided otherwise. Uniformity of regulation is absolutely essential in such matters, just as it is absolutely essential to have uniformity in the regulation of hours of service of interstate railroad employees if interstate commerce is to be both safe and efficient. In entrusting Congress with the power over interstate commerce the Constitution, *ipso facto,* imposed upon Congress the duty of insuring to that commerce safety and efficiency. Nothing could be more self-evident when the necessary compass of the commerce clause is fully understood. The need for uniformity, due to the interdependence of the very objects of the legislation in question, is the primary basis for this and every similar decision extending federal control. The fundamental principal—the principal of resulting powers—in all such cases is the same. They are many in number, and the scope of this article does not permit of their review, were such a review necessary. This class of cases is referred to for the purpose of determining, if possible, a basis for analogy from which to draw a conclusion in regard to the regulatory power over rates. Does such a basis exist? It is submitted that it does not, unless we can find a similar necessity for unity in all rate legislation, both intrastate and interstate. The interdependence spoken of in the class of cases just referred to is a physical interdependence. Obviously, such does not exist between different classes of rates. Interstate and intrastate rates may be interdependent for economic or geographical reasons, but this is not physical interdependence. A rate

[11]This decision would seem to preclude further discussion of narrower points raised in other cases, notably U. S. *v.* Colorado & N. W. R. Co. (1907) 157 Fed. 321; L. & N. R. R. Co. *v.* U. S. (1911) 186 Fed. 280; Erie R. R. Co. *v.* Russell (1910) 183 Fed. 722; U. S. *v.* St. L. S. W. Ry. Co. of Texas (1910) 184 Fed. 28.

is a charge for, not an instrument of transportation. Of course it is not to be argued that the existence or non-existence of this physical interdependence is, *per se,* the one and only criterion by which we determine whether or not the necessity for uniformity is real and potential. Obviously we need not find that the co-existence of federal and state authority over commerce is likely to be hazardous to life or limb before it is possible to argue successfully for the abolition of state authority. If this were necessary, a State might, for example, tax with impunity interstate commerce, or refuse entrance to foreign corporations doing an interstate business. But this much we must find, namely, that the exercise of state authority,—whether it be regulatory of rates, hours of labor, employers' liability, the equipment and inspection of rolling stock, or what not—necessarily impinges upon and burdens in a relatively immediate way, the full exercise of federal authority. We do so find in the case of safety appliances because of the direct connection between the equipment used in the two classes of traffic.[12] The situation is, of course, different as to employers' liability.[13] In the case of human equipment, that is train crews, Congress has left the regulation to the States,[14] although it need not have done so. As to hours of labor a federal act has been applied, which covers railroads and employees engaged in intrastate business.[15] What then of rates? Let us consider various decisions.

In *Munn* v. *Illinois,*[16]—one of the so-called "Granger Cases," —an epoch making decision in the development of our constitutional law, the Supreme Court upheld certain provisions of the Constitution and laws of Illinois regulating rates and practices in connection with grain elevators and warehouses, thus extending the doctrine of "public interest." In a learned opinion, replete with quotations from the sages of the common law in England, Chief Justice Waite said:

[12]Congress passed a boiler inspection act last year (36 Stat. at large. 913). Although its title is perhaps broad enough to include locomotives engaged exclusively in intrastate commerce, the language in the body of the act is narrowed to apply only to locomotives used in moving interstate and foreign traffic.

[13]Employers' Liability Cases (1908) 207 U. S. 463. See also, Mondou *v.* N. Y., N. H. & Hartford R. R. Co. (1912) 32 S. C. Rep. 169.

[14]Chic., R. I. & Pac. Ry. Co. *v.* Arkansas (1911) 219 U. S. 453; P. C. C. & St. L. Ry. Co. *v.* Indiana, decided by the Supreme Court, December 18, 1912. A federal full train crew law has been agitated in Congress.

[15]B. & O. R. R. Co. *v.* Interstate Commerce Commission (1911) 221 U. S. 612. See also Northern Pac. R. Co. *v.* State of Washington. decided January 9, 1912, showing the absolute exclusiveness of the federal regulation.

[16](1876) 94 U. S. 113.

"When the people of the United Colonies separated from Great Britain, they changed the form, but not the substance, of their government. They retained for the purposes of government all the powers of the British Parliament, and through their State constitutions, or other forms of social compact, undertook to give practical effect to such as they deemed necessary for the common good and the security of life and property. All the powers which they retained they committed to their respective States, unless in express terms or by implication reserved to themselves. Subsequently, when it was found necessary to establish a national government for national purposes, a part of the powers of the States and of the people of the States was granted to the United States and the people of the United States. This grant operated as a further limitation upon the powers of the States, so that now the governments of the States possess all the powers of the Parliament of England, except such as have been delegated to the United States or reserved by the people. The reservations by the people are shown in the prohibitions of the Constitutions.

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"* * * The warehouses of these plaintiffs in error are situated and their business carried on exclusively within the limits of the State of Illinois. They are used as instruments by those engaged in state as well as those engaged in inter-state commerce, but they are no more necessarily a part of commerce itself than the dray or the cart by which, but for them, grain would be transferred from one railroad station to another. Incidentally they may become connected with inter-state commerce, but not necessarily so. Their regulation is a thing of domestic concern, and, certainly, until Congress acts in reference to their inter-state relations, the State may exercise all the powers of government over them, even though in so doing it may indirectly operate upon commerce outside its immediate jurisdiction. We do not say that a case may not arise in which it will be found that a State, under the form of regulating its own affairs, has encroached upon the exclusive domain of Congress in respect to inter-state commerce, but we do say that, upon the facts as they are represented to us in this record, that has not been done."[17]

In *C., B. & Q. R. R. Co.* v. *Iowa*,[18] there was before the court the constitutionality of an act of Iowa establishing reasonable maximum rates and charges for the transportation of freight and passengers on the various roads of the State. Here Chief Justice Waite, again delivering the opinion of the court, said:

"The objection that the statute complained of is void because it amounts to a regulation of commerce among the States, has been sufficiently considered in the case of *Munn* v. *Illinois*. This

[17] *Ibid.* 124, 135.
[18] (1876) 94 U. S. 155.

road, like the warehouse in that case, is situated within the limits of a single state. Its business is carried on there, and its regulation is a matter of domestic concern. It is employed in state as well as in inter-state commerce, and, until Congress acts, the State must be permitted to adopt such rules and regulations as may be necessary for the promotion of the general welfare of the people within its own jurisdiction, even though in so doing those without may be indirectly affected."[19]

In *Peik* v. *Chicago and North-Western Railway Company*[20] similar questions arose under Wisconsin legislation, and Chief Justice Waite again said:

"As to the effect of the statute as a regulation of inter-state commerce. The law is confined to state commerce, or such inter-state commerce as directly affects the people of Wisconsin. Until Congress acts in reference to the relations of this company to inter-state commerce, it is certainly within the power of Wisconsin to regulate its fares, etc., so far as they are of domestic concern. With the people of Wisconsin this company has domestic relations. Incidentally, these may reach beyond the State. But certainly, until Congress undertakes to legislate for those who are without the State, Wisconsin may provide for those within, even though it may indirectly affect those without."[21]

Stone et al. v. *Farmers' Loan & Trust Co.*,[22] one of the so-called Railroad Commission cases, was a suit brought to enjoin the Railroad Commission of Mississippi from enforcing against the Mobile & Ohio Railroad Company the provisions of a statute of Mississippi providing for the regulation of freight and passenger rates on railroads in that State, and creating a commission to supervise the same. In this case the court said, speaking again through Chief Justice Waite:

"* * * Every person, every corporation, everything within the territorial limits of a State is while there subject to the constitutional authority of the State government. Clearly under this rule Mississippi may govern this corporation, as it does all domestic corporations, in respect to every act and everything within the State which is the lawful subject of State government. It may, beyond all question, by the settled rule of decision in this court, regulate freights and fares for business done exclusively within the State, and it would seem to be a matter of domestic concern to prevent the company from discriminating against persons and places in Mississippi. So it may make all needful

[19] *Ibid.* 163.
[20] (1876) 94 U. S. 164.
[21] *Ibid.* 177-8.
[22] (1886) 116 U. S. 307.

regulations of a police character for the government of the company while operating its road in that jurisdiction. In this way it may certainly require the company to fence so much of its road as lies within the State; to stop its trains at railroad crossings; to slacken speed while running in a crowded thoroughfare; to post its tariffs and time-tables at proper places, and other things of a kindred character affecting the comfort, the convenience, or the safety of those who are entitled to look to the State for protection against the wrongful or negligent conduct of others. This company is not relieved entirely from State regulation or State control in Mississippi simply because it has been incorporated by, and is carrying on business in, the other States through which its road runs. While in Mississippi it can be governed by Mississippi in respect to all things which have not been placed by the Constitution of the United States within the exclusive jurisdiction of Congress, that is to say, using the language of this court in *Cardwell* v. *Bridge Co.*, 113 U. S. 205, 210, 'when the subjects on which it is exerted are national in their character, and admit and require uniformity of regulations affecting alike all the States.' Under this rule nothing can be done by the government of Mississippi which will operate as a burden on the inter-state business of the company or impair the usefulness of its facilities for inter-state traffic. It is not enough to prevent the State from acting that the road in Mississippi is used in aid of inter-state commerce. Legislation of this kind to be unconstitutional must be such as will necessarily amount to or operate as a regulation of business without the State as well as within.

"The commission is in express terms prohibited by the act of March 15, 1884, from interfering with the charges of the company for the transportation of persons or property through Mississippi from one State to another. The statute makes no mention of persons or property taken up without the State and delivered within, nor of such as may be taken up within and carried without. As to this, the only limit on the power of the commissioners is the constitutional authority of the State over the subject. Precisely all that may be done, or all that may not be done, it is not easy to say in advance. The line between the exclusive power of Congress, and the general powers of the State in this particular, is not everywhere distinctly marked, and it is always easier to determine when a case arises whether it falls on one side or the other, than to settle in advance the boundary, so that it may be in all respects strictly accurate. As yet the commissioners have done nothing. There is, certainly, much they may do in regulating charges within the State, which will not be in conflict with the Constitution of the United States. It is to be presumed they will always act within the limits of their constitutional authority. It will be time enough to consider what may be done to prevent it when they attempt to go beyond."[23]

[23] *Ibid.* 334-5.

In *Covington, &c. Bridge Co.* v. *Kentucky*[24] the Supreme Court held invalid a Kentucky act which attempted to regulate tolls over the Ohio River Bridge at Covington. In speaking of the regulation of internal commerce the court said:

"* * * The adjudications of this court with respect to the power of the States over the general subject of commerce are divisible into three classes. First, those in which the power of the State is exclusive; second, those in which the States may act in the absence of legislation by Congress; third, those in which the action of Congress is exclusive and the States cannot interfere at all.

"The *first* class, including all those wherein the States have plenary power, and Congress has no right to interfere, concern the strictly internal commerce of the State, and while the regulations of the State may affect interstate commerce indirectly, their bearing upon it is so remote that it cannot be termed in any just sense an interference. Under this power, the States may authorize the construction of highways, turnpikes, railways, and canals between points in the same State, and regulate the tolls for the use of the same, *Railroad* v. *Maryland,* 21 Wall, 456; and may authorize the building of bridges over non-navigable streams, and otherwise regulate the navigation of the strictly internal waters of the State—such as do not, by themselves or by connection with other waters, form a continuous highway over which commerce is or may be carried on with other States or foreign countries; *Veazie* v. *Moor,* 14 How. 568; *The Montello,* 11 Wall. 411; S. C. 20 Wall. 430."[25]

Smyth v. *Ames*[26] is a most noteworthy case in that here for the first time the Supreme Court fully developed the true doctrine of due process of law, as required by the Constitution, in relation to railroad rates. A statute of Nebraska fixing maximum rates for intrastate transportation was before the court. The case was most elaborately argued by a number of the country's most brilliant lawyers, and Justice Harlan, for the court, rendered a lengthy opinion, most of which is not, however, pertinent to our discussion. But the following language, as to the scope of intrastate rate-making is decidedly in point:

"It cannot be doubted that the making of rates for transportation by railroad corporations along public highways, between points wholly within the limits of a State, is a subject primarily within the control of that State. And it ought not to be supposed that Congress intended that, so long as its forbore to establish rates on the Union Pacific Railroad, the corporation itself could

[24](1894) 154 U. S. 204.

[25]*Ibid.* 209-10.

[26](1897) 169 U. S. 466. See also, Ames *v.* Union Pacific Ry. Co. (1894) 64 Fed. 165.

fix such rates of transportation as it saw proper independently of the right of the States through which the road was constructed to prescribe regulations for transportation beginning and ending within their respective limits. On the contrary, the better interpretation of the act of July 1, 1862, is that the question of rates for wholly local business was left under the control of the respective States through which the Union Pacific Railroad might pass, with power reserved to Congress to intervene under certain circumstances and fix the rates that the corporation could reasonably charge and collect. Congress not having exerted this power, we do not think that the national character of the corporation constructing the Union Pacific Railroad stands in the way of a State prescribing rates for transporting property on that road wholly between points within its territory. Until Congress, in the exercise either of the power specifically reserved by the eighteenth section of the act of 1862 or its power under the general reservation made of authority to add to, alter, amend or repeal that act, prescribes rates to be charged by the railroad company, it remains with the State through which the road passes to fix rates for transportation beginning and ending within their respective limits."[27]

Then coming to the crux of the opinion, the court said:

"* * * It is only rates for the transportation of persons and property between points within the State that the State can prescribe; and when it undertakes to prescribe rates not to be exceeded by the carrier, it must do so with reference exclusively to what is just and reasonable, as between the carrier and the public, in respect of domestic business. The argument that a railroad line is an entirety; that its income goes into, and its expenses are provided for, out of a common fund; and that its capitalization is on its entire line, within and without the State, can have no application where the State is without authority over rates on the entire line, and can only deal with local rates and make such regulations as are necessary to give just compensation on local business."[28]

In the first *Employers' Liability Cases*[29] Justice White, after quoting the language of Marshall as to the nature and extent of the power of Congress over interstate commerce, used this forceful language:

"Accepting, as we now do, and as has always been done, this comprehensive statement of the power of Congress, we also adopt and reiterate the perspicuous statement made in the same case (p. 194), of those matters of state control which are not embraced in the grant of authority to Congress to regulate commerce."[30]

[27] *Ibid.* 521-22.
[28] *Ibid.* 541-42.
[29] (1908) 207 U. S. 463.
[30] *Ibid.* 493.

The court then quoted the famous language of Chief Justice Marshall in *Gibbons* v. *Ogden.*

Again, in the decision just rendered upholding the second Employers' Liability Act, the court, Justice Van Devanter, said that among the propositions bearing upon the extent and nature of the commerce clause that have come to be so firmly settled as no longer to be open to dispute is this:

"The phrase 'among the several states' marks the distinction, for the purpose of governmental regulation, between commerce which concerns two or more states and commerce which is confined to a single state and does not affect other states,—the power to regulate the former being conferred upon Congress and the regulation of the latter remaining with the states severally."[31]

In view of the language in the above cases and in many others which space does not admit discussing,[32] it would seem impossible to question the separability of the state and the federal function of rate-making. It necessarily results that since the power over internal commerce resides in the States, the state legislatures must be clothed with the rate-making authority necessary to the proper regulation of this internal commerce. Unless this were true the residuary power could not be exercised. This is self-evident and therefore does not require any lengthier analysis of cases, nor is it germane to our subject to discuss the character of the rate-making power, whether legislative, judicial or administrative, or whether a combination of two or all three of these characteristics.

Upon no reasonable interpretation of the words, "until Congress acts," used in several of these cases, can they be considered as giving Congress power over intrastate commerce, because the surrounding context shows plainly enough that these words are only to be read, "until Congress acts in relation to interstate commerce.". So, too, conversely if it be argued that these words are to be construed as laying down the principle that a State may regulate charges for interstate traffic, it is sufficient to say that in the case of *Covington Bridge Company* v. *Kentucky,* above referred to, such a construction, if correct, was overruled, in accordance with the prior case of *Wabash, etc., Railway Co.* v. *Illinois,*[33] a consideration of which is momentarily postponed. As

[31]Mondou *v.* N. Y., N. H. & Hartford R. R. Co. and three other cases. (1912) 32 S. C. Rep. 169, 173.

[32]See especially Dow *v.* Beidelman (1888) 125 U. S. 680; Georgia Banking Co. *v.* Smith (1888) 128 U. S. 174; Chicago, etc. Ry. *v.* Wellman (1892) 143 U. S. 339; Minneapolis & St. Louis R. R. Co. *v.* Minnesota (1902) 186 U. S. 257.

[33](1886) 118 U. S. 557.

those decisions explain, there has always been a third class of cases, in which state and federal power are concurrent—cases, for example, involving pilotage, quarantine and inspection laws—and in which the State may act in the absence of congressional regulation. But rate regulation has always been emphatically excluded from this class.

As further elucidating this principle of the complete separability of interstate and intrastate rate-making, certain cases involving the taxation by a State of foreign corporations are strikingly apposite. The most conspicuous of these cases for our purpose are *Pullman Company* v. *Adams*[34] and *Allen* v. *Pullman Company*.[35] In the former case the Supreme Court upheld a tax of the State of Mississippi on each sleeping and palace-car company carrying passengers from one point to another within the State, of one hundred dollars and twenty-five cents per mile for each mile of railroad track over which the company ran its cars within the State. The court, by Mr. Justice Holmes, said:

"* * * The company attempted by pleas and by an offer of evidence to bring before the court the fact that its receipts from this class of passengers [intrastate] did not equal the expenses chargeable against such receipts. It contended that these facts would show that the business within the State was merely a burden on its commerce between the States, while at the same time, it argued, it was compelled to assume that burden by § 195 of the state constitution, which declares sleeping car companies to be common carriers and subject to liability as such. The pleas were held bad on demurrer, the evidence was rejected, and the jury was instructed to find for the plaintiff on the facts admitted. These rulings and the refusal of the court to declare the above mentioned § 3387 unconstitutional are the errors assigned.

"If the clause of the state constitution referred to were held to impose the obligation supposed and to be valid, we assume without discussion that the tax would be invalid. For then it would seem to be true that the state constitution and the statute combined would impose a burden on commerce between the States analogous to that which was held bad in *Crutcher* v. *Kentucky*, 141 U. S. 47. On the other hand, if the Pullman Company, whether called a common carrier or not, had the right to choose between what points it would carry, and therefore to give up the carriage of passengers from one point to another within the State, the case is governed by *Osborne* v. *Florida*, 164 U. S. 650. The company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce. Both parties agree that the tax is a privilege tax."[36]

[34] (1903) 189 U. S. 420.

[35] (1903) 191 U. S. 171.

[36] *Ibid.* 421-22.

Concluding that the carriage was not obligatory, the tax was upheld.

In *Allen* v. *Pullman Company*, the Supreme Court upheld a law of Tennessee which taxed annually each sleeping car company $3,000 on its intrastate business. The court said that the case was indistinguishable from the *Adams Case*, when pressed with the argument that the tax was assessed upon traffic which bore such a small proportion to the entire business of the company within the State that it could not have been levied in good faith upon purely local business, and was but a thinly disguised attempt to tax the privilege of interstate commerce.

"* * * If the payment of this tax was compulsory upon the company before it could do a carrying business within the State, and the burden of its payment, because of the minor character of the domestic traffic, rested mainly upon the receipts from interstate traffic, there would be much force in this objection. Upon this proposition we are unable to distinguish this case from *Pullman Co.* v. *Adams*, 189 U. S. 420, decided at the last term, wherein it was held that the privilege tax imposed by the State of Mississippi, upon each car carrying passengers from one point in the State to another therein, was a valid tax, notwithstanding the fact that the company offered to show that its receipts from the carrying of the passengers named did not equal the expenses chargeable against such receipts. This conclusion was based upon the right of the company to abandon the business if it saw fit. It was urged that under the constitution of Mississippi the Pullman Company was a common carrier, required to carry passengers, and therefore could not be taxed for the privilege of doing that which it was compelled to do; but in view of a decision of the Supreme Court of Mississippi, sustaining the tax, it was assumed that no such objection existed under the state constitution."[37]

Clearly, if intrastate business is separable from interstate business, so must intrastate rates be separable from interstate rates, because rates are the symbol of business. They *are* the receipts which are declared separable for the purpose of taxation. If separable for that purpose, why are they not equally separable for the purpose of regulation? If, as in the *Adams Case* and the *Allen Case*, it did not matter that the taxation of the intrastate receipts was ultimately taken from the interstate receipts, why does it matter that the regulation of intrastate rates is ultimately responsible for a change and a consequent falling off in interstate rates? But granting the separability of the two kinds of commerce and the consequent separability of regulation, it may still be asked, is this separability complete in every case? In the decisions just

[37](1903) 191 U. S. 171, 181-82.

reviewed, the line between interstate and intrastate commerce is clearly defined, but is the line of demarcation always so distinct, or is there a "twilight zone" where state and federal jurisdiction meet; and, if so, what becomes of the power of the States? These are the main questions that must be answered. These are the questions which give such importance to the cases now pending before the Supreme Court, cases which seemed of such grave concern in their bearing upon the doctrine of States rights and the fundamental principle of our governmental system, as to lead to a resolution by the governors of the various States at their recent conference to petition the Supreme Court to hear them as *amici curiae.*

In *Wabash, etc., Ry. Co.* v. *Illinois,* the first of the two really borderland cases, there was before the court a statute of Illinois which enacted that if any railroad company should, within that State, charge or receive for transporting passengers or freight of the same class the same or a greater sum for any distance than it does for a longer distance in the same direction, it should be liable to a penalty for unjust discrimination. The defendant railroad made such discrimination in regard to goods transported from Peoria, Illinois, and from Gilman, Illinois, to New York, charging more for the same class of goods carried from Gilman than from Peoria, the former being 86 miles nearer the city of New York than the latter, this difference being in the length of line in the State of Illinois. The court held the statute invalid as a regulation of interstate commerce. Mr. Justice Miller, in delivering the opinion of the court, expressed some doubt whether the Illinois court's construction of the statute was correct in making it apply to commerce among the States, but said that the Supreme Court was bound by the construction given to the statute by the state court. Continuing, Justice Miller said:

"* * * It becomes, therefore, necessary to inquire whether the charge exacted from the shippers in this case was a charge for interstate transportation, or was susceptible of a division which would allow so much of it to attach to commerce strictly within the State, and so much more to commerce in other States. The transportation, which is the subject-matter of the contract, being the point on which the decision of the case must rest, was it a transportation limited to the State of Illinois, or was it a transportation covering all the lines between Gilman in the one case and Peoria in the other in the State of Illinois, and the city of New York in the State of New York?"[38]

[38](1886) 118 U. S. 557, 565.

"* * * We must, therefore, hold that it is not, and never has been, the deliberate opinion of a majority of this court that a statute of a State which attempts to regulate the fares and charges by railroad companies within its limits, for a transportation which constitutes a part of commerce among the States, is a valid law."[39]

It is difficult to see any error in this decision, although three justices dissented. The distinctive feature of the case lies in the fact that the rate sought to be regulated was for interstate transportation. Obviously, if such transportation is not to be treated in its entirety, but as divisible by each State, then there would be not only utter confusion in rate-making, but the power of Congress over interstate commerce would be absolutely vitiated. This is the effect on "other states" and "states generally" to which Chief Justice Marshall, with his remarkable prescience, alluded.

. So much for the *Wabash Case,* standing by itself. But unfortunately we cannot dismiss it here, because we find in the case of *Louisville & Nashville R. R. Co.* v. *Eubank*[40] that it has been somewhat misapplied. In that case the long and short haul clause, Section 218, of the Kentucky Constitution, was in issue. It had already been held in the case of *Louisville & Nashville R. R. Co.* v. *Kentucky,*[41] that this same section of the Kentucky Constitution when applied to places all of which are within the State, violated no provision of the Federal Constitution. But in the *Eubank Case* the facts were these: The defendant railroad exacted a rate of 25 cents per 100 pounds on tobacco from Franklin, Kentucky, to Louisville, Kentucky, and, at the same time, exacted on the same product from Nashville, Tennessee, to Louisville, over the same line, a rate of only 12 cents per 100 pounds, on account of water competition. The court held that the clause of the Kentucky Constitution which forbade the railroad company to continue to exact a rate from Franklin to Louisville higher than the rate from Nashville to Louisville was void as a direct regulation of the interstate rate, namely, the rate from Nashville to Louisville, because for business reasons such a requirement would necessarily lead the company to reduce its rate from Nashville rather than its rate from Franklin. In delivering the opinion of the court, Justice Peckham said that the *Wabash Case* was not exactly in point, and yet, after a most minute analysis of it, made it the real basis of the decision. He said:

[39] *Ibid.* 575.
[40] (1902) 184 U. S. 27.
[41] (1902) 183 U. S. 503.

"Is not this reasoning applicable here? The Nashville owner of tobacco wishes to have it transported to Louisville and asks the defendant to carry it. It responds that it would like to carry it at the rate of twelve cents per one hundred pounds, but that it cannot do so because it has established a reasonable rate between points both of which are in Kentucky, and which rates are more than twelve cents, and that if it were to carry at the rate of twelve cents from Nashville to Louisville it would be necessary, on account of the law of Kentucky, to carry at the same rate all tobacco between all points in that State, which would entail a loss in the business between those points, which the company would not be justified in sustaining; therefore the transportation is declined, for it cannot get more than twelve cents from the Nashville man. Is it an answer to this statement to say that the company can get this business by lowering its rates within the State to the same rate as charged from Nashville? Is it bound, in order to secure this interstate commerce, to lower its rates all through the State? If it be, is not the law which accomplishes this result a direct interference by the State with interstate commerce? And if it do not lower its state rates and in consequence must raise its interstate rates, in order to make its state rates valid, and thus must lose to an appreciable and important extent the interstate commerce, is not a law from which such necessary and direct consequences result a regulation in effect by the State, of that commerce which ought to be free therefrom?

* * * * * * * * *

"It has been urged that, assuming Congress to have the power to fix interstate rates, if that body should prescribe the interstate rate for the transportation of commodities (tobacco, for instance) from Nashville to Louisville, for a railroad carrier, that the State might then fix the local rates by that standard, and if so, why could it not do the same thing when the carrier itself fixes its interstate rate? In the case supposed, the rate is fixed and the interstate commerce regulated by the body which has the power to impose such rate on the carrier and to regulate its interstate commerce. The State might, in the case supposed, enact that the road should not charge more, or at a greater rate, for a short haul within the State than Congress provided for the long interstate haul. The reason is that Congress in the case presented is assumed to have the power to direct and regulate the interstate rate, and having that power and exercising it the State could then provide that its internal charge should not exceed that rate, and there would be in that case no interference with or regulation of interstate commerce directly or indirectly by the State, its action could have no possible effect upon the interstate rate, as the amount of the charge would be regulated by the body with which the right of regulation exists.

* * * * * * * * *

"In the case at bar the State claims only to regulate its local rates by the standard of the interstate rate, and says the former shall be no higher than the latter, but the direct effect of that

provision is, as we have seen, to regulate the interstate rate, for to do any interstate business at the local rate is impossible, and if so, it must give up its interstate business or else reduce the local rate in proportion. That very result is a hindrance to, an interference with, and a regulation of, commerce between the States, carried on, though it may be, by only a single company."[42]

This is admittedly a close case. The facts are such that it may be supported and yet Judge Sanborn's doctrine repudiated. That is to say, in the *Eubank Case,* from the very nature of the proviso in the Kentucky Constitution, there is a closer approach to the direct regulation of the two rates, both the intrastate and the interstate rate, than in the present cases. In fact, what the court in the *Eubank Case* held could not be done is what Judge Sanborn in effect, said must be done, namely, the fixing of intrastate rates by an interstate standard. But aside from all this, there is the glaring feature which renders the *Eubank Case* distinct from the *Wabash Case,* and the failure of the court to give more weight to it has led to a decision which is believed to be at least open to much question. That feature is simply this: the rate sought to be regulated by the Kentucky Constitution was an intrastate rate, while in the *Wabash Case* the rate sought to be regulated by the Illinois statute was an interstate rate. True, it may be said in answer, but what of the effect upon the interstate rate that the regulation of the intrastate rate in the *Eubank Case* would cause? This is so admirably discussed in Mr. Justice Brewer's dissenting opinion, in which Mr. Justice Gray concurred, and the conclusions are so sound, that Mr. Justice Brewer's language is here quoted at some length:—

"But if a State may select as a standard the interstate rates prescribed by Congress and make its local rates the same, without interfering with interstate commerce, it would certainly seem that it could in like manner take the interstate rates which the carrier himself prescribes, and compel conformity of local rates thereto and still not be subject to the charge of interfering with interstate commerce. It is strange to be told that the action of a carrier in fixing interstate rates is potent to render unconstitutional the legislation of the State respecting local rates, when the like action of Congress in prescribing interstate rates is not so potent. In other words, action by the carrier in pursuit of its own financial interests overturns the constitution and statute of the State when like action by Congress in the exercise of its constitutional power does not.

* * * * * * * * *

"I do not suppose it will be seriously contended that the de-

[42](1902) 184 U. S. 27, 40-41, 43.

fendant can invalidate all the local rates which the legislature of Kentucky may see fit to enforce by simply saying that outside of the State it somewhere touches a competitive point and is forced to reduce its interstate rates by reason of the competition there existing. * * *

"It seems to me, in conclusion, that a state legislature has full power over local rates, subject only to the restriction that it cannot require a carrier to carry without reasonable compensation, and that when it legislates for local rates alone it may fix those rates by figures, or upon the basis of any standard which it sees fit to adopt, and the mere fact that it bases them upon some standard is not legislation regulating that standard—the local rates are alone the matter regulated. For these reasons I cannot concur in the opinion and judgment."[43]

The Supreme Court has never referred to this case, a fact worthy at least of notice, because of the number and variety of commerce cases which it has been called upon to review in the last decade. But in two quite recent instances it would seem to have virtually overruled it,—certainly the dissenting views of Justice Brewer were more nearly adopted.

The first of these cases is *Mo. Pac. Ry. Co.* v. *Kansas.*[44] There the question was whether a railroad company could be compelled by mandamus from a state court, to obey an order of the Kansas Board of Railroad Commissioners, requiring it to operate a passenger train between a point within the State and the state line. The road in question extended from Madison, Kansas, to Monteith Junction, Missouri, eighty-nine miles of it being in Kansas and nineteen miles in Missouri. There were no terminal facilities at Monteith Junction, and the trains did not remain over at that point, but were run three miles further on into the State of Missouri to Butler Station. In holding that the order did not impose a direct burden upon interstate commerce, when construed according to its necessary effect, Chief Justice White said:

"* * * But under the hypothesis upon which the contention rests the operation of the train to Butler would be at the mere election of the corporation, and, besides, even if the performance of the duty of furnishing adequate local facilities in some respects affected interstate commerce, it does not necessarily result that thereby a direct burden on interstate commerce would be imposed. *Atlantic Coast Line* v. *Wharton,* 207 U. S. 328."[45]

Note the significant words used, "at the mere election of the

[43] *Ibid.* 48-49, italics inserted.
[44] (1910) 216 U. S. 262.
[45] *Ibid.* 284.

corporation." Similarly in the *Eubank Case,* the effect on the interstate rate complained of, by operation of the long and short haul clause of the Kentucky Constitution,—that is, the raising of the interstate rate to a parity with the local rate,—was "at the mere election of the corporation," for the intrastate rate could have been lowered to a parity with the interstate rate, and would it "necessarily result that thereby a direct burden on interstate commerce would be imposed?" Of course, these cases are largely a question of degree and we must look through form to substance. But wherein is the burden more direct or greater than in the *Eubank Case* or the *Adams* and *Allen Cases?*

Again, in the Corporation Tax decision[46] the court virtually reiterated the statement of Mr. Justice Brewer above quoted and italicized, when, for the purpose of showing that the standard of measurement is not, *per se,* conclusive, it said, through Justice Day:

"It is therefore well settled by the decisions of this court that when the sovereign authority has exercised the right to tax a legitimate subject of taxation as an exercise of a franchise or privilege, it is no objection that the measure of taxation is found in the income produced in part from property which of itself considered is non-taxable." [47]

Let us substitute the words "regulation" and "non-regulable" for the words "taxation" and "non-taxable," and the word "rates" for the words "income produced in part from property," and the passage will read:

"It is therefore well settled by the decisions of this court that when the sovereign authority has exercised the right to regulate a legitimate subject of regulation as an exercise of a franchise or privilege, it is no objection that the measure of regulation is found in the rates which of themselves considered are non-regulable."

What is the distinction? It is submitted that there is none, except that in the Corporation Tax cases the Federal Government was the aggressor, so to speak, and the Supreme Court was giving complete effect to the exercise of a federal power, while in the *Eubank Case* the State was the aggressor, and the question was rather as to the complete effect of the exercise of a state power. Albeit this is an age of strong federal tendencies, such a distinction is without merit, because the power of each unit of govern-

[46] Flint *v.* Stone Tracy Co. (1910) 220 U. S. 107.
[47] *Ibid.* 165.

ment, whether State or Federal, is equally plenary within its sphere of action. In fact the court, in the Corporation Tax cases, based its conclusions largely upon cases which elucidated this principle in connection with the exercise of State, not Federal power.

This is not a new principle announced in the Corporation Tax cases. It had been developed and reiterated through a long line of decisions, unbroken until the Western Union Telegraph and Pullman cases[48] were decided in 1910. It is indeed strange that the court should have decided these cases upon the commerce clause, but it is even more strange that the very next year the court should have said, in its opinion in the Corporation Tax cases, that the Western Union and Pullman cases were entirely consistent with the doctrine there announced. An act of Kansas required all foreign corporations to pay a charter fee of a given per cent. of their entire authorized capital stock as a condition precedent to conducting intrastate business in Kansas. Although by express intent and operation this tax was directed solely against intrastate business, the authorized capital stock being used merely as a standard, not an object of taxation, and although in previous decisions, notably the Adams and the Allen cases which we have already considered, the Supreme Court emphatically refused to condemn such a method of taxation, nevertheless it held the Kansas act void as a regulation of interstate commerce. Economically and geographically the relations between interstate and intrastate rates are so closely interwoven that the separability of the state and the federal function is not as clearly defined, as it is in the case of state taxation of intrastate business. It is, nevertheless, both real and apparent, and the controlling principle in the one instance must be the controlling principle in the other. However, since the writer has treated the Kansas cases at some length in a previous article,[49] it is not thought necessary to dwell longer upon them now, except to point out again that they have been the source of much misconception, especially in Minnesota, in connection with the question of rate regulation—a misconception, however, which is not beyond the possibility of being repudiated,—if in fact it has not already been, unwittingly as it seems, by the reasoning in the Corporation Tax decision.

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[48]Western Union Tel. Co. *v.* Kansas (1910) 216 U. S. 1; Pullman Co. *v.* Kansas (1910) 216 U. S. 56. See also, Ludwig *v.* Western Union Telegraph Co. (1910) 216 U. S. 146.

[49]"Constitutional Limitations upon State Taxation of Foreign Corporations," 11 COLUMBIA LAW REVIEW 393.

The writer is truly amazed to find an esteemed contemporary maintaining, with courage that exhorts admiration, in the face of that long line of decisions which have just been reviewed, that Congress has the power to regulate intrastate rates.

"The several States now have power to regulate the Federal agency with respect to its intrastate state traffic, only because Congress has not yet seen fit to exercise its full powers. Whenever Congress shall fully occupy the entire scope of its powers, all state statutes regulating the intrastate traffic of interstate railroads will be instantly suspended, and all governmental friction resulting from diverse and inconsistent legislation will be avoided."[50]

What, may we ask, becomes of that long line of decisions from *Gibbons* v. *Ogden* down to the present day, wherein this proposition is denied? Our esteemed contemporary would have us believe that, "in effect," they have been overruled by *Smyth* v. *Ames*. On the contrary, *Smyth* v. *Ames*, as we have just seen, is one of those very decisions, maintaining the absolute separability of intrastate and interstate rate regulation. Any railroad incorporated under a federal charter, as was the Union Pacific Railroad in this case, is by virtue of such charter made an agency of the Federal government. The court merely said—and this *dictum* may still be open to question—that in the absence of congressional consent, such an agency cannot be burdened by state regulation of its internal rates, any more than it can be burdened by state taxation of its franchise.[51] In other words, the absolute exclusiveness of the federal power in such cases has its source, not in the commerce clause, but in the fact that the agency is a creature and instrument of the national government. Neither state nor nation may take action which encroaches upon or cripples the exercise of the exclusive power of sovereignty in the other. Most of our railroads are interstate, so the exclusion, by the learned author, of the traffic of purely intrastate railroads, is negligible. If his real dilemma, as would appear, is as to the true definition of interstate commerce, it is sufficient to say that the Supreme Court has, in a number of cases, and with an abundance of reasoning, defined just when an interstate shipment ceases to be interstate, and becomes intrastate.[52]

[50] "Congress and Intra-State Commerce," David W. Fairleigh. 9 COLUMBIA LAW REVIEW 38, 45.

[51] See California *v.* Central Pac. R. R. Co. (1887) 127 U. S. 1. See also, McCullough *v.* Maryland (1819) 4 Wheat. 316; Osborne *v.* Bank (1824) 9 Wheat. 738; Railroad Co. *v.* Peniston (1873) 18 Wall. 5.

[52] See especially Gulf, etc. Ry. *v.* Texas (1907) 204 U. S. 403; General Oil Co. *v.* Crain (1908) 209 U. S. 211. By section 6 of the Act to Regulate Commerce and the amendments thereto, if no joint rate over any through

Would that the difficulties of constitutional law could be vaulted over as easily as our esteemed contemporary would have us believe! Perhaps we may some day come, not merely to national incorporation, but national ownership of railroads. Such might not be without constitutional as well as practical difficulties. But that is beside the question.

If the commerce clause may comprehend intrastate rates and thus overthrow the reserved power of the states explicitly given to them by the Tenth Amendment, why may it not also overthrow other co-ordinate powers granted under the Constitution and held to be inviolable? Why, for example, following out Judge Sanborn's reasoning to its logical conclusion, might not the commerce clause be paramount to the Fifth Amendment? And yet we know that the Interstate Commerce Commission could not order a confiscatory rate, and we are aware of the Supreme Court's evasion in the Commodities Clause cases[53] of any statement which might vitiate the Fifth Amendment.

How has the Interstate Commerce Commission viewed the question? Let us take a concrete case.

For many years the fish dealers of Pensacola, Florida and Mobile, Alabama, had been strong competitors in the Alabama markets, the rates of the Southern Express Company from both points to those markets having been the same, although the mileage from Pensacola is, in most instances, less.

In 1907, the Alabama Railroad Commission, against the protest of the Southern Express Company, reduced the rates from Mobile about one-half, the rates from Pensacola remaining unchanged. Whereupon the Pensacola fish dealers asked the Interstate Commerce Commission to compel the Southern Express Company to free them from the resulting discrimination in favor of Mobile. The reasonableness of the express company's rates out of Pensacola when considered in and of themselves was not assailed. In denying its power to grant to the complainants the re-

route has been established, the several carriers operating over such through route shall file, print and keep open to public inspection the separately established rates, fares and charges applied to the through transportation. But the fact that intrastate rates that may be complained of are thus made a part of the interstate rate is at the mere election of the carriers, because they could have established a joint rate, with which the State could not interfere, any more than the State or the carrier can, by requiring local billing of interstate shipments between points within the State, change the character of such shipments, and prevent Congress or the Interstate Commerce Commission from regulating the same.

[53]U. S. ex rel *v.* Del. & Hudson Co. (1908) 213 U. S. 366; U. S. *v.* Lehigh Valley Ry. Co. (1910) 220 U. S. 257.

lief which they asked, the Commission, speaking through Commissioner Harlan said, after quoting section one of the Interstate Commerce Act, defining the limitations upon the jurisdiction of the Commission:

"This language seems to have but one meaning, and that is that, although the Congress constitutionally may give and in fact has given to the national commission authority to control and regulate the rates to be demanded and accepted by interstate carriers on interstate traffic, it has excluded us from the exercise of any such powers as to the purely state traffic of interstate carriers. Whatever authority may be vested in the courts for the redress of such wrongs, it seems reasonably clear that this Commission, under such circumstances as are disclosed on the record, may not lawfully interfere by an order, the purpose of which is directly or indirectly to affect the rates imposed upon the defendant by the order of the Alabama commission.

"The carriage of traffic by a common carrier for one community or one set of shippers at less than it carries the same traffic for a like distance, and under substantially similar transportation conditions, for another community or another set of shippers is not only in contravention of fundamental rights and justice but is essentially iniquitous. If such a discrimination is practiced by a common carrier as between communities or different sets of shippers within the same state and on traffic moving only within the state, redress may usually be had under the state laws. On the other hand, if an interstate carrier is guilty of such a discrimination with respect to interstate traffic, redress may be had under the act to regulate commerce. But when a carrier, as in this case, serves two communities similarly situated, by hauling the same traffic under similar conditions from a point of origin to destinations in the same state and also to the same destinations from an interstate point of origin, it is not altogether clear that existing legislation affords redress against a discrimination, as between the two points, when resulting from an order by the state commission. But unless some such power is lodged somewhere under appropriate legislation, it is evident that state-made rates, if established in pursuance of a narrow or selfish local policy, may not only hinder and harm and burden interstate traffic and interstate interests, but may, if adjusted with that end in view, take from a point in another state a business that naturally belongs to that point, or in which it is entitled at least to participate, on the basis of equal rates and equal opportunity.

"* * * The defendant is one concern and one instrument of commerce operating through and across those invisible lines that separate the several states from one another. It has but one corps of officers and employees and but one equipment. Its only object is to serve all the shippers in the territory through which it passes. That object is legitimately effected only when it serves its whole

constitutent public upon substantially similar terms when the conditions are substantially similar. If it voluntarily makes a distinction between traffic that moves from a point in one state to a point in another state and traffic that moves between points in the same state, and gives to the state traffic lower rates than to the interstate traffic moving under substantially similar conditions, it imposes upon the latter a burden that it ought not justly to bear, and it discriminates against one community in favor of another. The same burden and discrimination follow if instead of voluntarily so adjusting its rates it is compelled so to adjust them by the action of a state commission. It may be that this anomaly in transportation necessarily results from our dual system of government and that a remedy is beyond reach without some amendment to the National Constitution. On principle it is clear that a carrier operating through two or more states is but one vehicle of commerce, and all traffic moved by it, whether state or interstate, ought, when the general transportation conditions are the same, to bear its just proportion of the cost of operation and ought to yield no more and no less than its just proportion of the revenues of the carrier. Any other theory is fundamentally inequitable, illogical, and unreasonable. It may be, but on that point we express no opinion, that the Congress may constitutionally protect interstate commerce, as well as the carriers that are engaged in interstate transportation, by requiring that any state traffic moved by such a carrier shall bear its just proportion of the cost of operation and yield its proper proportion of profit to the carrier; and that with such an end in view it may authorize this Commission to fix minimum rates, at least, for state traffic when moved by carriers engaged also in interstate transportation; or that it may provide that no carrier engaged in interstate transportation of passengers or property may at the same time carry state traffic at rates that are less than the rates exacted by it for interstate carriage of like distance and under like transportation conditions. It has, however, not attempted any such legislation, and whether such an enactment would stand the test of scrutiny by the courts under the Constitution as it now stands, and if so, whether it would be desirable from the standpoint of a broad public policy, are questions that must ultimately be determined by the legislative power and therefore cannot profitably be discussed by the Commission in this proceeding."[54]

[54]Saunders *v.* Southern Express Company (1910) 18 I. C. C. Rep. 415, 422-424. See also, In Matter of Freight Rates (1905) 11 I. C. C. Rep. 180; Hope Cotton Oil Co. *v.* Texas & Pac. Ry. Co. (1907) 12 I. C. C. Rep. 265; Reliance Textile and Dye Works *v.* Southern Ry. Co. (1907) 13 I. C. C. Rep. 48. The Interstate Commerce Commission has recently ruled that it will not, with respect to passenger rates, grant relief beyond May of this year from the prohibitions of the Fourth Section of the Act, against through rates in excess of intermediate rates, where the intermediate rates have been reduced by state action. See Fourth Section, Order 89.

In Alpha Portland Cement Co. *v.* The B. & O. R. R. Co., et al., 22 I. C. C. Rep. 446, 451, decided in January last, Commissioner Clements said: "At-

In spite of what the Commission—an astute body always zealous for greater powers—has said, Judge Sanborn, in the Minnesota cases, declared that

"* * * the natural and reasonable construction of the proviso in Section I [of the Interstate Commerce Act] is that it was inserted out of abundance of caution to make sure that the broad terms of the act did not go beyond the constitutional power of the Congress and directly regulate intrastate commerce more than was necessary completely to regulate interstate commerce, and that it has no farther effect upon the subject of discrimination now under discussion."[65]

Space does not admit of lengthy quotations from this opinion. Moreover, every argument advanced by Judge Sanborn is believed to be completely refuted by the court in the Kentucky case.

"* * * The question, then, comes at last to this: Whether a business or economic policy of a railroad company, as distinguished from a legal duty, to change its interstate rates to correspond with just and reasonable local rates imposed by the state for the transportation of traffic originating and ending wholly within the state, can be said to be a direct, and not merely an indirect, effect of the state's action. Thus, in distinguishing direct from indirect effect, can such conditions be made the basis of a presumption of fact, equivalent to a rule of law, such as a federal statute forbidding interstate rates from exceeding the sum of the local rates between given interstate points? One difference between such presumption and rule is the uncertainty whether the railroad company in the end, at its election, will not decline to yield to the conditions created by the two sets of rates—interstate and local rates—and so defeat any presumption of fact that might be indulged in its favor by the courts, while the rule of law may always be certainly enforced through judicial decision. Another difference is that any election by the company to change the interstate rates would seem to be an intervening cause, and consequently render such change an indirect result. Without deciding whether there may be facts attending the administration of a state law which show a result so inevitable, for business reasons, that the result should be held to be the direct effect of the law, though not

tention also is called to the rate to Elkins, W. Va., which is $2 from Manheim and $1.80 from Universal, for distances of 88 and 203 miles, respectively. Prior to the filing of this complaint the rate from Manheim was $2.30. This presents the reverse of the low intrastate rate effecting an unjust discrimination against an interstate point. The present rate from Manheim is clearly unjust, both relatively with Universal and *per se*. Complainant asks for an order removing the discrimination, but whether or not our jurisdiction extends to such a case it would perhaps be inappropriate to consider or further discuss the Elkins rate, inasmuch as the Supreme Court now has under consideration the same general question in another proceeding."

[65] (1911) 184 Fed. 765, 796.

specified in the law, yet as applied to this case the fallacy of ascribing equality to the presumption of fact and rule of law in both conclusive and permanent effect may, we think, be further tested by the consequences. The logic of the company's argument would release its local rates from governmental regulation altogether; for the United States could not fix the local rates, because they are local, and the state could not change them, because it would thereby cast a direct burden on interstate commerce. The inevitable effect would be that, so far as rate-making is concerned, the State Railroad Commission would have no reason to exist, and state regulation of state rates would become simply historic."[56]

After laying great emphasis upon the case of *Mo. Pac. Ry. Co.* v. *Kansas,* which has already been referred to, the court continued:

"Now, when it is recalled that one of the claims made here is that the reduction of the local rates between points on the south side of the Ohio river (like Louisville, Covington, and Newport) and Bardstown will for business or economic reasons necessitate a corresponding reduction of the Jeffersonville and Cincinnati rates to Bardstown, not to speak of points north of those cities, it is hard to distinguish such a claim from that urged by the railroad company in the Kansas case in regard to the absence of terminal facilities at the state line and the consequent necessity to operate 20 miles further, to Butler. This latter claim was based alone upon a business or economic reason, but the answer of the Chief Justice was that this 'would be at the mere election of the corporation.' This answer is equally applicable to the complaint made here. This right of election signifies choice between alternatives, in the sense that either or any of them may be rightfully selected. The choice is to be exercised by the company. It follows that the burden on interstate rates complained of here is one that may or may not be assumed by the company, according to its financial interests. It does not follow that its averment of a present intent to assume the burden will practically be either a necessary or wise choice of alternatives, much less that the company will continue to carry the burden. The important point, however, is that the Supreme Court has declared that such a burden is not in its effect direct."[57]

Judge Sanborn speaks of a broad and fundamental difference between the power of the state over intrastate commerce and the power of the nation over interstate commerce. This statement is misleading to say the least, because as we have seen from the foregoing decisions, the power, within its proper sphere of action, is just as exclusive in the one case as in the other. Nor by this is it meant that the extent of power under the commerce clause is limited by the reasons which may have caused its grant to Congress. But the extent of that power *is* limited by the express

[56](1911) 186 Fed. 176, 199-200.

[57]*Ibid.* 203.

terms of its grant. Judge Sanborn himself says one moment that the two classes of rates are inextricably interwoven, while the very next moment he says that the two classes of business are distinct for the purpose of determining the inherent reasonableness of the intrastate rates. As for the sttaement of the learned judge that "the reduction of local rates does not interfere with interstate rates 'as a matter of law,' yet it may do so as a matter of fact,"[58] it is impossible to comprehend the meaning, if indeed it has any.

If the commerce clause is as comprehensive and overwhelming as Judge Sanborn would make it, why might it not vitiate other equally inviolable rights under the Constitution, whether granted to the States or to the National Government? For example, carrying Judge Sanborn's argument to a perfectly logical conclusion, could it not completely vitiate the Fifth Amendment? Yet we cannot overlook the words of the Supreme Court on this very point, notably in the *Commodities Clause Cases*.[59]

Eighteen years ago, Mr. Justice Brewer, in an opinion fraught with almost incalculable importance to the welfare of our nation, made this statement, one of the most cogent ever rendered by any member of our highest court:

"Constitutional provisions do not change, but their operation extends to new matters as the modes of business and the habits of life of the people vary with each succeeding generation. The law of the common carrier is the same to-day as when transportation on land was by coach and wagon, and on water by canal boat and sailing vessel, yet in its actual operation it touches and regulates transportation by modes then unknown, the railroad train and the steamship. Just so is it with the grant to the national government of power over interstate commerce. The Constitution has not changed. The power is the same. But it operates today upon modes of interstate commerce unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop."[60]

If the Minnesota decision is right, are not previous decisions overthrown and is not a "different kind" of commerce added to "new modes" of commerce? But "The Constitution has not changed. The power is the same," until the people, not the courts, through the exercise of their power of amendment see fit to enlarge it, by changing the Constitution.

WILLIAM C. COLEMAN.

BALTIMORE.

[58](1911) 184 Fed. 765, 797.

[59]U. S. *v.* Delaware & Hudson Co. (1908) 213 U. S. 336, 416. See also, U. S. *v.* Lehigh Valley Ry. Co. (1911) 220 U. S. 257.

[60]In re Debs (1895) 158 U. S. 564, 591.